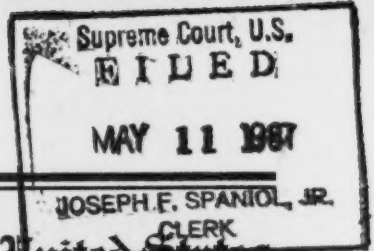


(3)
No. 86-1519



In the Supreme Court of the United States

OCTOBER TERM, 1986

**AKZO N.V., ENKA B.V., ARAMIDE MAATSCHAPPIJ
V.O.F., and AKZONA INCORPORATED, PETITIONERS**

v.

**U.S. INTERNATIONAL TRADE COMMISSION and
E.I. DU PONT DE NEMOURS AND COMPANY**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

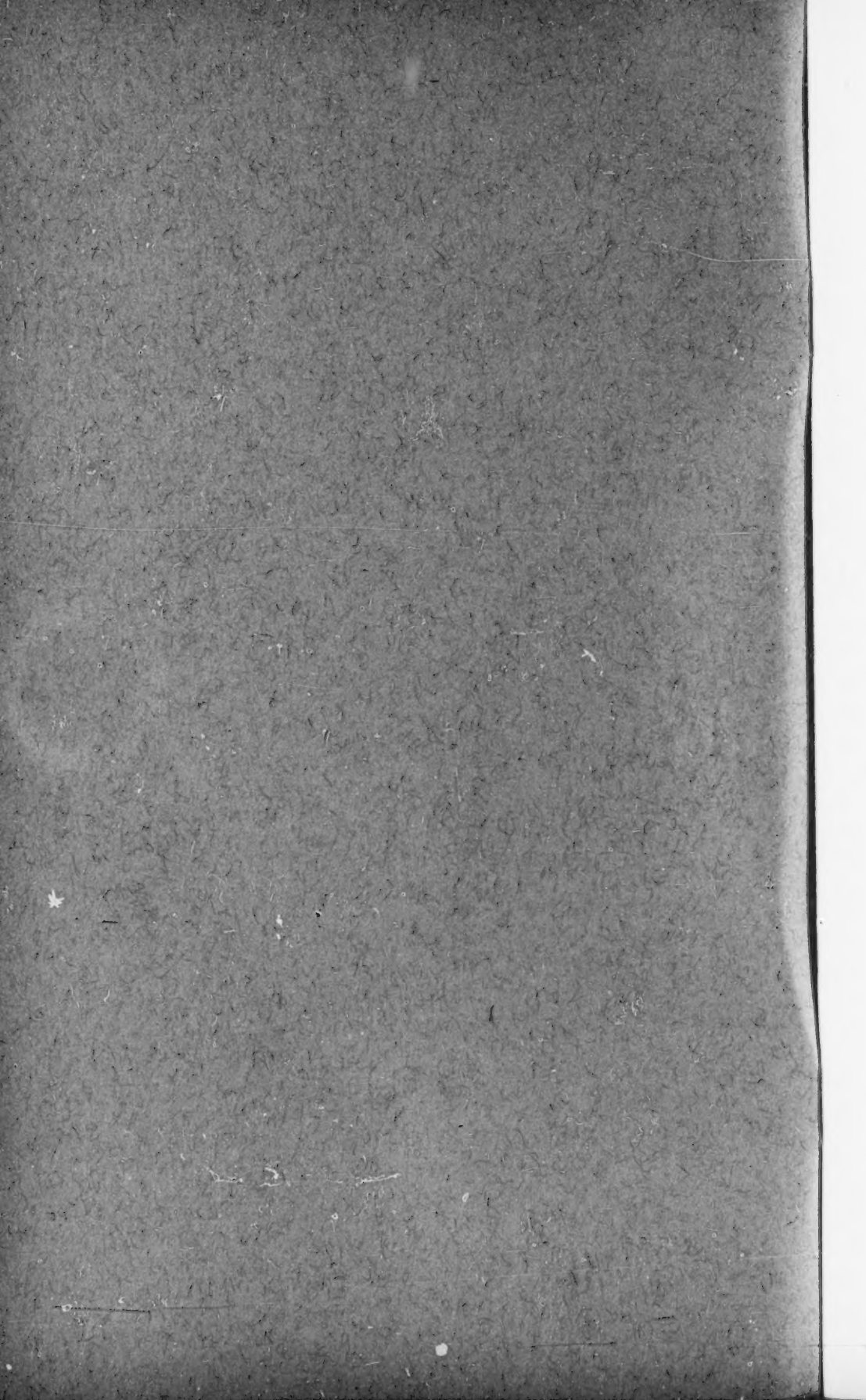
**BRIEF FOR THE U.S. INTERNATIONAL TRADE
COMMISSION IN OPPOSITION**

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QUESTIONS PRESENTED

1. Whether the U.S. International Trade Commission violated petitioners' due process rights by denying their managerial employees and in-house counsel (while giving to their outside counsel and experts) access to their competitor's confidential business information, whose designation as "confidential" petitioners could have challenged but did not challenge.

2. Whether the Constitution permits Congress to delegate to the U.S. International Trade Commission, rather than an Article III court, the power to make a determination of patent validity and enforceability solely for the purpose of determining the existence of unfair methods of competition and unfair acts in import trade, and without res judicata or collateral estoppel effect.

3. Whether 19 U.S.C. 1337, which makes unlawful and authorizes action against unfair methods of competition and unfair acts in the importation of articles or in their sale in the United States, whether practiced by foreign or U.S. nationals, violates the obligation of the United States under international agreements to accord petitioners and their products treatment no less favorable than that accorded U.S. nationals and products.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 808 F.2d 1471. The public versions of the opinions of the U.S. International Trade Commission and the administrative law judge (public and confidential versions of which have been filed with the Clerk by petitioners) are unofficially reported at USITC Pub. No. 1824. The protective order issued by the administrative law judge (Pet. App. 33a-39a) and the relevant orders denying peti-

tioners' requests to modify the protective order (Pet. App. 40a-56a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1986. The petition for a writ of certiorari was filed on March 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 337 of the Tariff Act of 1930, 19 U.S.C. (& Supp. III) 1337, is a trade statute directed against unfair practices in the import trade. The statute was originally enacted as Section 316 of the Tariff Act of 1922, ch. 356, 42 Stat. 943. Throughout various reenactments, revisions, and amendments over the last 65 years, the substantive portion of the statute has remained essentially unchanged. It provides (19 U.S.C. 1337(a)):

Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the [U.S. International Trade] Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.^[1]

¹ A companion statutory provision, 19 U.S.C. 1337a, passed in response to the ruling of the Court of Customs and Patent Appeals that process patents were not properly within the

Section 337(a) does not specifically define unfair acts or methods of competition but leaves identification of such acts or methods to the discretion of the U.S. International Trade Commission (ITC or Commission), subject to court review.² The ITC has defined these terms by analogy to other statutes and the common law. This is one reason why Section 337(a) provides that Section 337 operates "in addition to any other provision of law."

The ITC most commonly institutes Section 337 investigations on receipt of a proper complaint. In such cases, there are three parties: complainant(s), respondent(s), and a Commission investigative attorney, who represents the public interest in the investigation. On institution, the ITC refers the investigation to an administrative law judge (ALJ) for an evidentiary hearing.

Section 337 investigations are subject to the Administrative Procedure Act (APA), 5 U.S.C. (& Supp. III) 551 *et seq.* They are adversarial proceedings, including a period for discovery, a hearing on

ing Corp., 75 F.2d 826, cert. denied, 296 U.S. 576 (1935)), states that

scope of the Commission's jurisdiction (*In re Amtorg Trad-*

[t]he importation for use, sale, or exchange of a product made, produced, processed, or mined under or by means of a process covered by the claims of any unexpired valid United States letters patent, shall have the same status for the purposes of section 1337 of this title as the importation of any product or article covered by the claims of any unexpired valid United States letters patent.

² *In re Von Clemm*, 229 F.2d 441 (C.C.P.A. 1955); *In re Orion Co.*, 71 F.2d 458, 463-464 (C.C.P.A. 1934); *In re Northern Pigment Co.*, 71 F.2d 447, 454-455 (C.C.P.A. 1934); *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247 (C.C.P.A.), cert. denied, 282 U.S. 852 (1930).

the record, the right to cross-examine witnesses, and the right to compel testimony.³ At the conclusion of these proceedings, the ALJ issues an initial determination (ID). The ID includes findings on the existence of unfair acts or methods of competition in the importation of goods, and whether there is an effect or tendency to destroy or substantially injure an industry, efficiently and economically operated, in the United States. If the unfair act, injury, and economical operation criteria are satisfied, there is a finding of violation of Section 337.

Once the ALJ has issued the ID, any party may petition the Commission for review, or the Commission may review the ID on its own motion (19 C.F.R. 210.54-210.55). On review, the ITC has "all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule" (5 U.S.C. 557(b); see 19 C.F.R. 210.56 (c)).

On a finding of violation of Section 337, the ITC determines what remedy, if any, is appropriate.⁴ In determining whether any remedy should be ordered, the ITC is required to consider certain public interest factors, which may lead it to conclude that no remedy

³ Petitioners misstate the ITC's procedures when they allege (Pet. 6 n.9) that "discovery must ordinarily be completed within four months, and only two weeks are allowed for the hearing even in 'more complicated cases.'" In fact, discovery in Section 337 cases often proceeds up to and even during the course of trial, and the length of trial, which is determined by the needs of the parties and the judgment of the ALJ, may be several weeks.

⁴ The ITC terminates the investigation at this point if no violation is found to exist.

should issue (19 U.S.C. 1337(d)).⁵ Indeed, the legislative history of the 1974 amendments to Section 337 (Trade Act of 1974, Pub. L. No. 93-618, § 341 (a), 88 Stat. 2053) indicates that these public interest considerations are paramount in the administration of the statute (S. Rep. 93-1298, 93d Cong., 2d Sess. 193, 197 (1974)).

Finally, pursuant to Section 337(g), the ITC notifies the President of its determination on violation and action on remedy. The President has 60 days to disapprove the ITC's action for policy reasons. If the President has not disapproved the ITC's action after 60 days, or approves it within 60 days, the ITC's determination becomes final and appealable (19 U.S.C. (Supp. III) 1337(c)).

2. On April 18, 1984, a complaint was filed with the ITC on behalf of respondent E.I. Du Pont de Nemours & Company (Du Pont) alleging a violation of Section 337 and 19 U.S.C. 1337a by reason of the importation of certain aramid fibers⁶ manufactured

⁵ Section 337(d) directs the Commission to order exclusion of imported goods

unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

Similar provisions apply to issuance of a cease-and-desist order. See 19 U.S.C. 1337(f).

⁶ Aramid fiber is a synthetic fiber five times stronger than steel on an equal-weight basis, having extraordinary heat and stretch resistant qualities. It has a wide range of applications, including bulletproof vests, cables, and aircraft mainframes. Du Pont sells its aramid fiber under the registered trademark Kevlar; petitioners sell their aramid fiber under the registered trademark Twaron.

abroad in accordance with a process that, if practiced in the United States, would infringe claims of U.S. Letters Patent 3,767,756 (the '756 patent).⁷ On May 14, 1984, the ITC voted to institute an investigation pursuant to Section 337(b) and named four related firms as respondents in the investigation. These firms (petitioners here) are Akzo N.V., Enka B.V., and Aramide Maatschappij v.o.f., all of the Netherlands, and Akzona, Inc., of Enka, North Carolina. An ALJ was appointed, and petitioners were directed to respond to the complaint (Notice of Investigation, 49 Fed. Reg. 21806 (1984); C.A. App. 133-135).

On May 21, 1984, the ALJ issued an administrative protective order governing access to and use of confidential business information, as defined in the Commission's rules, 19 C.F.R. 210.6, that would be produced during discovery in the investigation (Pet. App. 33a-39a). Paragraph 10 of the order (*id.* at 37a) stated that, if a recipient of confidential business information under the order disagreed with respect to the designation of the material as confiden-

⁷ Du Pont had already been involved in litigation with petitioners concerning this and other patents pertaining to aramid fiber, beginning when petitioners sued Du Pont in the United States District Court for the Western District of North Carolina in 1983. Before the Commission's institution of the investigation, petitioners made a written submission to the ITC urging it to refuse to institute an investigation because of alleged deficiencies in the complaint and concurrent litigation on related patents in federal district court in Delaware (C.A. App. 122-128). The ITC instituted an investigation with respect to only one count of Du Pont's complaint, declining to investigate alleged unfair methods of competition by misappropriation of benefits of Du Pont's investments in the development of commercial uses and customers for aramid fiber (*id.* at 133-135, 670).

tial, that party was to "confer [with the supplier] as to the status of the subject information proffered within the context of this order." In the event that the two parties continued to disagree regarding the status of the information, the protective order provided that a party could raise the issue with the ALJ or the Commission (*ibid.*).

During a preliminary conference on June 22, 1984, petitioners made an oral motion to modify the existing protective order (see C.A. App. 672 (citing 6/22/84 Tr. 45)). Subsequently, petitioners identified three in-house counsel for the Dutch petitioners, and the general counsel of Akzona, Inc., as potential recipients of confidential business information under the ITC's protective order (C.A. App. 227). Du Pont and the Commission investigative attorney opposed modification of the protective order.

Applying the balancing test set forth in the ITC's opinion in *Certain Rotary Wheel Printers*, 5 I.T.R.D. 1933 (1983), the ALJ denied the motion to permit in-house counsel access to confidential business information under the ITC's protective order (Pet. App. 40a). The ALJ found that petitioners had failed to show the requisite need on the part of these particular attorneys to have access to Du Pont's confidential business information.

On February 8, 1985, petitioners again moved to modify the protective order to permit petitioners' in-house counsel, and the general manager of petitioners' Industrial Fibers Group with supervisory responsibility for the production and marketing of aramid fiber, to have access to confidential information. The ALJ heard extensive oral argument, and testimony of Du Pont's Chief of Marketing for Textile Fibers, on whether there would be substantial competitive harm

to Du Pont if these persons had access to the confidential information in question (C.A. App. 19942-19990). The ALJ repeatedly urged Du Pont to review its designation of confidential information. In his decision, the ALJ found that the record disclosed that the information at issue was confidential business information and that disclosure of the information would cause substantial harm to Du Pont's competitive position. In light of these considerations, the ALJ found that petitioners would be required to demonstrate a clear need for the evidence. The ALJ found that, on the record before him, petitioners had failed to establish that need, and he denied petitioners' motion (Pet. App. 47a, 55a-56a).

On May 9, 1985, the ALJ issued an ID finding that there was a violation of Section 337(a) in the unlawful importation or sale of certain aramid fibers produced overseas by means of a process that, if practiced in the United States, would infringe the '756 patent. He also found that the unlawful importation has the tendency substantially to injure an efficiently and economically operated industry in the United States. C.A. App. 1123.

On July 15, 1985, the Commission decided to review certain portions of the ID, made additional findings on issues related to the validity of the '756 patent, and affirmed the ALJ's determination with respect to validity.⁸ The Commission determined not

⁸ The Commission determined to review those portions of the ID pertaining to anticipation of the '756 patent under 35 U.S.C. 102 and obviousness of the patent under 35 U.S.C. 103. Based on its conclusions regarding the level of ordinary skill in the art, the Commission affirmed the ALJ's findings with respect to anticipation and obviousness and determined that the '756 patent was not invalid. Petitioners have not chal-

to review the remainder of the ID, which thereby became the determination of the Commission (19 C.F.R. 210.53(h)). Based on the record and its findings, the Commission concluded that there was a violation of Section 337 (Notice of Commission Decision to Review ID, 50 Fed. Reg. 30246 (1985); C.A. App. 1127). Having determined that there was a violation of Section 337, the Commission requested and received written submissions on the issues of remedy, public interest, and bonding. On November 25, 1985, the Commission determined that an exclusion order limited to certain forms of aramid fiber produced by petitioners or their affiliates was the appropriate remedy (Commission Action and Order, 50 Fed. Reg. 49776 (1985); C.A. App. 1144-1147). On January 26, 1986, pursuant to Section 337(g), the President decided not to disapprove the Commission's action, which thereupon became final.

3. The court of appeals affirmed the ITC's determination in all respects (Pet. App. 1a-32a). Concerning the patent issues and other substantive issues, the court of appeals held that the ITC's determination was based on correct legal standards and was supported by substantial evidence on the record (*id.* at 6a-16a, 23a-27a, 29a-30a). The court also considered and rejected petitioners' procedural challenges.

a. The court of appeals closely examined the terms and enforcement of the ITC protective order and concluded that petitioners' due process claims were groundless (Pet. App. 17a). The court of appeals concluded that the ITC's protective order provided reasonable access to confidential information, and

lenged in this Court the ITC's determination with respect to the patent issues, or the affirmance of that determination by the court of appeals.

that petitioners had never invoked the dispute resolution procedures of paragraph 10 of the protective order. Furthermore, the court of appeals found that the ITC's policy on disclosure of confidential information to an opposing party's managerial personnel and in-house counsel represents an appropriate balance between competing demands and that application of that policy through a three-part balancing test "[could not] be faulted" in this case (*id.* at 19a).

The court of appeals rejected petitioners' argument that the ITC's protective order denied them due process rights guaranteed by the APA and concluded that the requirements of the APA were satisfied by petitioners' representation by competent outside counsel and expert witnesses who had unrestricted access to all the evidence. The court of appeals noted (Pet. App. 20a-21a) that

"the affirmative grant of the right to appear apparently bestowed by [5 U.S.C.] 555(b) is not blindly absolute, without regard to the status or nature of the proceedings and concern for the orderly conduct of public business." * * * Whatever else § 555(b) guarantees to parties to an administrative proceeding under § 337, it does not mandate disclosure of significant confidential information to in-house counsel and corporate executives of a business competitor—where that information is fully available to outside counsel. Akzo's contention withers in the face of unrebutted evidence that more than 90 people representing Akzo, including numerous expert witnesses and members of the battery of four law firms comprising Akzo's defense team, had unrestricted access to Du Pont's confidential information.

Finally, the court of appeals held that petitioners had failed to demonstrate that they suffered any actual harm or prejudice as a result of the protective order procedure. Moreover, the court of appeals noted that "we have neither found nor been directed to any judicial decision mandating, in the circumstances present here, that business confidential information *must* be made available to inside management," and that there is a substantial body of precedent upholding confidentiality comparable to that accepted by the ITC. Pet. App. 21a.

b. The court of appeals rejected petitioners' argument that Section 337 proceedings are "'inherently judicial'" and involve "'essentially private rights'" and that therefore the Constitution requires adjudication of Section 337 issues by Article III courts (Pet. App. 28a). The court of appeals concluded that, although private rights may be affected by Section 337 determinations, the statute is directed toward protection of the public interest from unfair trade practices in international commerce. Moreover, the court of appeals noted that the Constitution expressly grants plenary power to Congress to regulate commerce with foreign nations, and held that Section 337 is a valid delegation of this broad congressional power for the public purpose of providing an adequate remedy for domestic industries against unfair practices in import trade. *Ibid.* (citing *Buttfield v. Stranahan*, 192 U.S. 470, 492 (1904)).

c. The court of appeals rejected petitioners' argument that the ITC's protective order procedure discriminated against petitioners on the basis of their Dutch nationality and was therefore in violation of U.S. treaty obligations. The court of appeals stressed that petitioners were accorded the same rights as

domestic companies in Section 337 proceedings, and held that petitioners had failed to demonstrate discriminatory treatment, since the protective order treated confidential information of all parties identically. In addition, the court of appeals noted that discrimination arguments had been rejected in a previous Section 337 investigation. Pet. App. 22a-23a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 14-22) that their rights under the Due Process Clause and the APA were violated because only their 90 outside lawyers, experts, and other representatives, not their in-house counsel and management personnel, were given unencumbered access to Du Pont's confidential business information. Petitioners fail to demonstrate that any decision of this Court or another court of appeals supports that claim.

The court of appeals carefully considered petitioners' arguments and concluded that, in the context of a Section 337 investigation, the ITC had accorded petitioners their constitutional and statutory rights to due process.⁹ The terms of the protective order,

⁹ The ITC's determinations under Section 337 are formal adjudicatory proceedings under the APA. See S. Rep. 93-1298, *supra*, at 195 (ITC determinations on violation to be made on the record after notice and opportunity for full hearing in conformity with APA). As petitioners recognize, the APA "codif[ies] traditional due process standards" (Pet. 18 n.22); indeed, a separate "due process" inquiry into the adequacy

providing for in camera hearing of specified "confidential information" and granting access to confidential information to in-house counsel and employees of the parties only on special permission of the Commission or the ALJ, were consistent with ITC policy and practice. Petitioners agreed to the protective order without qualification (C.A. App. 21239-21242). The terms and application of that order conform to APA requirements and represent a rational balancing of the parties' interests.

Paragraph 10 of the order specifically stated that, if a recipient of confidential business information under the order disagreed with respect to the designation of the material as confidential, that party "shall * * * confer [with the supplier] as to the status of the subject information proffered within the context of this order." In the event that the two parties continued to disagree regarding the status of the information, a party could raise the issue with the ALJ or the Commission. Pet. App. 37a. As the court of appeals noted (*id.* at 18a), petitioners did not invoke this procedure. Petitioners, having failed to invoke the very procedure intended to protect their rights, have no basis now to argue that the ITC's protective order deprived them of due process.

Moreover, as the court of appeals properly recognized, the ITC operates under unique constraints in conducting Section 337 investigations and must rely

of procedures followed in formal adjudication is generally unnecessary. 1 C. Koch, *Administrative Law and Practice* § 7.1, at 546 (1985). As petitioners also recognize (Pet. 17), the APA and not Fed. R. Evid. 615 applies to this case. The constitutional and statutory claims joined in the first question presented by the petition, therefore, are essentially a single argument: that the ITC's procedures violated the APA.

on the voluntary production of information by parties in order to carry out its statutory duties.¹⁰ Section 337 investigations inevitably involve the discovery and production of sensitive information relating to the operations, financial condition, and business strategies of all parties (see Pet. App. 33a-34a). By statute, the ITC must make a determination whether there is a violation of Section 337 within 12 months (18 months in more complicated cases) after institution of an investigation. Thus, expeditious, yet thorough, discovery is essential in Section 337 proceedings.¹¹ Completion of adequate discovery within the statutory time limits requires that the parties cooperate with regard to designation of documents as confidential, and with regard to production procedures.¹²

¹⁰ Petitioners argue (Pet. 10 n.16) that the ITC's power to compel production of information under 19 U.S.C. 1333 mitigates this need, but an investigation such as the one at issue here, involving thousands of pages of confidential information, would be impossible to complete within the ITC's strict statutory time limits if the ITC had to resort to compulsory process on a repeated basis to obtain the necessary information.

¹¹ Congress recognized that the statutory time limit could pose administrative problems and noted in the legislative history of the 1974 Act that "[t]he full hearing required would be a full 'due process' hearing, *with the Commission of course being able to impose reasonable restraints on the time to be devoted to such hearings*" (S. Rep. 93-1298, *supra*, at 195 (emphasis added)).

¹² The Federal Circuit has recognized the unusual constraints under which the ITC operates in the context of anti-dumping and countervailing duty investigations. See *U.S.*

A Section 337 proceeding is analogous in certain respects to complex litigation in the courts. It is well recognized that courts have wide discretion in fashioning the terms of protective orders, and "[t]he trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

The protective order issued in this investigation was fashioned to protect the interests of all parties in full discovery. The order identified material that could be considered confidential and provided a means whereby either party could object to the claimed confidential status of information. The definition of confidential information was limited to that type of information that has consistently been the subject of a protective order, and overdesignation was consistently discouraged (see C.A. App. 18992, 19786). In those instances where petitioners requested disclosure of confidential business information to their managerial employees and in-house counsel, the ALJ heard extensive argument and, contrary to petitioners' assertions (Pet. 21 n.24), properly placed the burden on Du Pont to show that the information in question was confidential and that disclosure would cause substantial injury to Du Pont (C.A. App. 19942-19990). Petitioners' burden of showing need applied not to the status of information as confidential, but to the question whether information that is confidential should nonetheless be disclosed to in-house counsel or mana-

Steel Corp. v. United States, 730 F.2d 1465, 1468 (1984). Even more difficulties exist with regard to discovery and protection of confidential information in Section 337 investigations.

gerial employees of an opposing party who is a business competitor.¹³

Courts have consistently recognized the need for "umbrella orders" in complex litigation such as this investigation.¹⁴ Moreover, provisions similar to paragraph 10 of the ITC's order have been found sufficient to protect parties from overdesignation of confidential business information.¹⁵

Petitioners suggest that the "Sisyphean" burden of showing that it is "absolutely necessary" for a party to have access to confidential information could never be met.¹⁶ Considering that petitioners never at-

¹³ Contrary to petitioners' assertion, ITC procedures do not provide that "at no stage is the party claiming confidentiality required to prove it" (Pet. 21 n.24). If the confidentiality of information is challenged, as provided for in paragraph 10 of the protective order, the burden is placed squarely on the party asserting confidentiality to demonstrate that the information is in fact properly deemed confidential within the terms of the Commission's rules and the protective order.

¹⁴ See, e.g., *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1023-1024 (D.C. Cir. 1984) (citing *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F. Supp. 866, 879 n.18 (E.D. Pa. 1981)), vacated on other grounds, 737 F.2d 1170 (D.C. Cir. 1984) (en banc); *Cipollone v. Liggett Group Inc.*, 106 F.R.D. 573, 583 (D.N.J. 1985).

¹⁵ E.g., *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F. Supp. at 890-891; *Cipollone v. Liggett Group Inc.*, 106 F.R.D. at 584-585.

¹⁶ Despite petitioners' insistence on citing the phrase, "absolutely necessary" is not the standard for disclosure applied by the ITC. If access to confidential information is sought for in-house counsel or other employees of a party, the party seeking access must establish that it has "no other reasonable way of adequately preparing and presenting its arguments in the absence of such access." *Certain Rotary Wheel Printers*, 5 I.T.R.D. at 1937 (citation omitted). This is the

tempted to demonstrate *any* particular need for disclosure, and relied merely on the unsupported assertions of counsel, this argument is without foundation. Moreover, outside legal counsel, having access to the confidential information at issue, is in an excellent position to demonstrate to the ALJ the need of a client for access to particular confidential information and counsel's inability to represent the client's interests adequately without disclosure of such confidential information.

Petitioners argue that the APA guarantees to a corporate party the absolute right to appear in person, through its in-house counsel and employees, at an administrative proceeding, and have access to all information, including confidential business information.¹⁷ But no court has ever held that the right "to appear in person or by or with counsel" (5 U.S.C. 555(b)) precludes an agency from denying a party's in-house personnel access to confidential business information of a competitor that finds its way into the record. Cf. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933) (upholding, un-

standard applied by the ALJ in this case. Moreover, as both the ALJ and the court of appeals noted, petitioners were in fact able to and did prepare and present their arguments, challenging and presenting evidence on every issue except infringement (see Pet. App. 20a, 21a).

¹⁷ Notably, petitioners' argument, based as it is on the notion of an absolute right of access, has no limiting principle. According to petitioners, the Constitution and the APA require that a corporation's in-house counsel and management be given access to *all* information produced to a tribunal in administrative or judicial proceedings, no matter how little need those persons have for the information and no matter how great the harm caused by disclosure. Petitioners can point to no decision that departs so far from common sense.

der former statutory provisions, limitations on hearing before ITC's predecessor agency designed to prevent company from learning competitor's confidential business information). Petitioners certainly "appear[ed]" at the hearing in this case, "in person" for much of the hearing and "by or with counsel" at all times. As the court of appeals noted, "[petitioners] fail[] to recognize that 'the affirmative grant of the right to appear apparently bestowed by Section 555(b) is not blindly absolute, without regard to the status or nature of the proceedings and concern for the orderly conduct of public business.'" Pet. App. 20a (quoting *deVyver v. Warden, U.S. Penitentiary*, 388 F. Supp. 1213, 1222 (M.D. Pa. 1974) (citing *Easton Utilities Commission v. Atomic Energy Commission*, 424 F.2d 847, 852 (D.C. Cir. 1970))). Likewise, no court has ever held that making the complete record available to counsel fails to satisfy the general rule that the record "shall be made available to the parties" (5 U.S.C. 556(e)).

Petitioners were represented by competent and experienced counsel and experts in relevant fields. Petitioners' representatives had complete access to the record and responded fully to Du Pont's arguments and the evidence of record. Indeed, petitioners challenged Du Pont on every point (except infringement), presenting their own economic and market forecasts and five affirmative defenses. Thus, this case differs significantly from those cases on which petitioners rely (Pet. 18-19), which address the issue of total denial of access to the party or counsel.¹⁸ The record

¹⁸ *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292 (1937); *Greene v. McElroy*, 360 U.S. 474 (1959); *Morgan v. United States*, 304 U.S. 1 (1938); *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1963); see also *Abourezk v.*

in this case shows that petitioners were not denied "a reasonable opportunity to know the claims of the opposing party and to meet them" (*Morgan v. United States*, 304 U.S. at 18). Moreover, as the court of appeals concluded, petitioners suffered no "actual harm" in the presentation of their case.¹⁹

Reagan, 785 F.2d 1043, 1060-1061 (D.C. Cir. 1986), cert. granted, No. 86-656 (Dec. 15, 1986), cited at Pet. 19. Petitioners also rely (Pet. 19-20) on certain cases that do endorse a right of the party to be present in person—as opposed to through counsel—at certain stages of certain proceedings or to obtain personal access to discovered information. None of the decisions that petitioners cite, however, endorses any right to learn a competitor's confidential business information. See *Helminski v. Ayerst Laboratories*, 766 F.2d 208, 218 (6th Cir.), cert. denied, 474 U.S. 981 (1985); *Doe v. District of Columbia*, 697 F.2d 1115, 1119-1120 (D.C. Cir. 1983); *In re San Juan Star Co.*, 662 F.2d 108, 118 (1st Cir. 1981). Indeed, the court in *Doe* pointed specifically to orders that forbid counsel to disclose confidential business information to their clients as examples of permissible protective orders (697 F.2d at 1120 n.8). Finally, petitioners rely on various right-of-public-access cases as if those cases endorsed an absolute right to attend proceedings and to inspect and copy judicial records (Pet. 14 n.19, 21-22). They claim, apparently, that the public has a right to learn Du Pont's confidential business information if used in administrative proceedings and that petitioners' right to learn that information follows *a fortiori*. The public, however, obviously does not have any such right. "[T]he right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, * * * courts have refused to permit their files to serve as * * * sources of business information that might harm a litigant's competitive standing." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).

¹⁹ A showing of actual harm or prejudice is required to warrant a reversal on due process grounds. *Helminski v.*

2. Petitioners claim (Pet. 22-26) that, for at least the last 13 years, the Commission has been operating under a statute that unconstitutionally gives it powers that can only be exercised by an Article III court. That argument, quite properly characterized by the court of appeals as one "employing the 'kitchen sink' or 'let's try anything' approach to appellate advocacy" (Pet. App. 28a), does not merit this Court's review.

The determination whether to exclude imported goods or prohibit their sale in the United States, in order to protect U.S. industries from unfair trade practices in international commerce, is made pursuant to Congress's expressly enumerated power "[t]o regulate Commerce with foreign Nations" (U.S. Const. Art. I, § 8, Cl. 3). "The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution." *Buttfield v. Stranahan*, 192 U.S. 470, 492 (1904).²⁰ Moreover, the ITC cannot award money damages and does not exercise anything remotely resembling "all ordinary powers of district courts" (*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982) (opinion of Brennan, J.); see *CFTC v. Schor*, No. 85-621 (July 7, 1986), slip op. 19).

Section 337 and its predecessor provisions are nothing more or less than a delegation of Congress's Article I power (*Sealed Air Corp. v. ITC*, 645 F.2d 976,

Ayerst Laboratories, 766 F.2d at 218; *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1963).

²⁰ As this Court held in *Buttfield*, the ability, even of citizens, to engage in importation is not a vested right, but one granted as an act of grace.

985-986 (C.C.P.A. 1981)) for the purpose of providing an adequate remedy for domestic industries against unfair practices undertaken abroad (*id.* at 985; *In re Orion Co.*, 71 F.2d at 467).²¹ The Commission (subject to presidential review), not the courts, has exercised this delegated power for 65 years, and throughout that time it has "entertained complaints of importation or sale of articles allegedly made in accordance with the specifications and claims of a U.S. patent" (S. Rep. 93-1298, *supra*, at 196).²²

²¹ Moreover, the court of appeals properly recognized that "a § 337 proceeding 'is not purely private litigation "between the parties" but rather is an "investigation" by the Government into unfair methods of competition or unfair acts in the importation of articles into the United States'" (Pet. App. 28a (quoting *Young Engineers, Inc. v. ITC*, 721 F.2d 1305, 1315 (Fed. Cir. 1983))). The statute's requirement of substantial injury to a U.S. industry, and the remedies that it provides, demonstrate the focus of the statute on public rather than purely private rights. Contrary to petitioners' argument (Pet. 25-26), the court of appeals did not err by relying on a distinction between public and private rights. The Court has held that such a distinction is not necessarily *determinative* of Article III issues, but it has hardly regarded the distinction as unimportant. See *Schor*, slip op. 19.

²² Section 337 does not, however, function merely as the international extension of U.S. patent, trademark, and copyright laws. *Textron, Inc. v. ITC*, 753 F.2d 1019, 1028 (Fed. Cir. 1985). Indeed, Section 337 provides that the ITC must find more than an unfair act or method of competition. The statute provides that the accused imports must have "the effect or tendency * * * to destroy or substantially injure an industry, efficiently and economically operated, in the United States or to prevent the establishment of such an industry" (19 U.S.C. 1337(a)). Even if the ITC finds a violation of Section 337(a), public interest considerations may preclude

Before 1974, when importers were charged with patent infringement as a form of unfair trade, they could not raise the defense of patent invalidity unless a court of competent jurisdiction had already declared the patent invalid (S. Rep. 93-1298, *supra*, at 196). In the 1974 amendments, Congress considerably expanded the rights of parties such as petitioners in Section 337 proceedings by giving the ITC the power to consider the validity and enforceability of patents in deciding whether there is a violation of Section 337. In 1974, Congress substantially amended Section 337(c) to provide that the ITC should accept and consider evidence regarding all legal and equitable defenses.²³

The legislative history of the Trade Act of 1974 reflects Congress's careful limitation of the effect of

the selected remedy or the President may disapprove, for policy reasons, the ITC's action in ordering a remedy.

It is doubtful whether Congress could give jurisdiction over Section 337 investigations to an Article III court so long as the President retains unrestricted discretion to disapprove Section 337 determinations for policy reasons. Article III does not countenance "an extrajudicial revisory authority" over the decisions of the judiciary. *Glidden Co. v. Zdanok*, 370 U.S. 530, 582 (1962) (plurality opinion). Section 337 as amended avoids this potential Article III pitfall by providing for review by the United States Court of Appeals for the Federal Circuit after the presidential review period. The decision of the President to disapprove a Section 337 determination for policy reasons is not reviewable, either directly or indirectly, in the Federal Circuit. *Duracell, Inc. v. ITC*, 778 F.2d 1578, 1581 (Fed. Cir. 1985).

²³ The Senate report observed that "[t]he Commission would * * * consider the evolution of patent law doctrines, including defenses based upon antitrust and equitable principles, and the public policy of promoting 'free competition', in the determination of violations of the statute." S. Rep. 93-1298, *supra*, at 196.

ITC determinations. The Senate Finance Committee stated (S. Rep. 93-1298, *supra*, at 196 (emphasis added)):

The Commission is not, of course, empowered under existing law to set aside a patent as being invalid or to render it unenforceable, and the extent of the Commission's authority under this bill is to take into consideration such defenses and to make findings thereon *for the purposes of determining whether section 337 is being violated*.

The relief provided for violations of section 337 is "in addition to" that granted in "any other provisions of law". The criteria of section 337 differ in a number of respects from other statutory provisions for relief against unfair trade practices. For example, in patent-based cases, the Commission considers, *for its own purposes under section 337*, the status of imports with respect to the claims of U.S. patents. *The Commission's findings neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws in particular factual contexts*. Therefore, it seems clear that any disposition of a Commission action by a Federal Court should not have a res judicata or collateral estoppel effect in cases before such courts.

Commission decisions on patent issues are thus made *solely* for the purpose of Section 337 and have no res judicata effect. See also Pet. 28 n.32; cf. *Corning Glass Works v. ITC*, 799 F.2d 1559, 1565 & n.5 (Fed. Cir. 1986) (Federal Circuit does not defer to ITC legal determinations on issues of patent law).

In short, the Commission exercises delegated Article I powers and has, since 1974, allowed importers and foreign manufacturers to raise legal and equitable defenses to charges of unfair trade practices. The

Commission considers those issues and makes non-binding determinations of such issues as patent validity and enforceability solely for the purposes of Section 337. It is inconceivable that, in so doing, the Commission exercises powers reserved to the judiciary under Article III.²⁴

3. Petitioners argue (Pet. 26-29) that they received treatment at the ITC that differs from that accorded a domestic firm defending a patent infringement case in a federal district court, and that the ITC's determination is thus in violation of the obligations of the United States under Article III(4) of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 5, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (GATT), and Article XVI(1) of the Treaty of

²⁴ We cannot let pass without response petitioners' groundless charge that the ITC is an "unabashedly political agency that views its mission as protecting U.S. firms from foreign competition" (Pet. 25), although we do not think, in light of the foregoing analysis, that it has any relevance to the Article III issue that petitioners raise. The ITC is an independent, bipartisan agency organized and empowered to carry out the duties assigned to it by Congress. The organization of the ITC is described in 19 U.S.C. 1330(a). Commissioners are appointed to nine-year terms by the President, with the advice and consent of the Senate. No commissioner who has served more than five years may be reappointed. Not more than three of the six commissioners may be members of the same political party. The ITC's "mission" is "protecting U.S. firms" only in the sense that Section 337 is intended to protect industries in the United States from unfair acts in the import trade. Finally, the ITC has developed a substantial body of expertise in Section 337 matters, of which patent issues are only one element in some instances. The ITC deals with "a particularized area of law" (*Schor*, slip op. 18 (quoting *Northern Pipeline*, 458 U.S. at 85 (opinion of Brennan, J.))) and has expertise that is not open to reasonable question.

Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942 (Netherlands Treaty). Petitioners do not claim that the decision below on this issue conflicts with any decision of this Court or a court of appeals. In any event, petitioners' claim is wrong.

What constitutes "national treatment" depends on the context. See, *e.g.*, Netherlands Treaty Art. XXIII (defining "national treatment" as treatment no less favorable than that accorded to domestic nationals, companies, products, etc. "in like situations"). The question with respect to national treatment of persons, as the court of appeals recognized, is whether petitioners were accorded the same rights as domestic firms in a Section 337 investigation, and the court correctly ruled that petitioners were indeed accorded the same rights. Pet. App. 22a.

Section-337 does not discriminate between domestic and foreign companies. A foreign company operating in the United States is entitled to file a complaint under Section 337, and a domestic company that seeks to import goods from abroad may find them excluded if their importation would violate Section 337. *Certain Spring Assemblies & Components Thereof*, 216 U.S.P.Q. (BNA) 225 (ITC 1981), *aff'd* on other grounds *sub nom. General Motors Corp. v. ITC*, 687 F.2d 476 (C.C.P.A. 1982), *cert. denied*, 459 U.S. 1105 (1983). Moreover, the protective order procedure applies equally to both foreign and domestic parties in Section 337 investigations.

Petitioners claim that parties defending a patent infringement suit in a federal court receive more favorable treatment in respect of access to confidential information than importers and foreign manufacturers defending a Section 337 case (and that

therefore there is a discrimination between foreign and domestic products in violation of the Netherlands Treaty and the GATT). That claim, however, is based on an attempt to compare quite different proceedings. Section 337 requires resolution of "efficient and economic operation" and "injury" questions not involved in an ordinary infringement suit, and it is those questions that routinely involve confidential information about business conditions and strategies. It is pure speculation for petitioners to assert that, if such issues were to arise and confidential information were to be presented in a case in federal district court, the court would give them access to it. Indeed, federal district courts frequently allow counsel, but *not* their clients, access to competitors' confidential business information. See, e.g., *Ball Memorial Hospital v. Mutual Hospital Insurance*, 784 F.2d 1325, 1345-1346 (7th Cir. 1986); *Doe v. District of Columbia*, 697 F.2d at 1120 & n.8; *Triangle Ink & Color Co. v. Sherwin-Williams Co.*, 61 F.R.D. 634 (N.D. Ill. 1974); *Maritime Cinema Service Corp. v. Movies en Route, Inc.*, 60 F.R.D. 587, 590 (S.D.N.Y. 1973). See generally 4 J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 26.75, at 26-488 to 26-490 n.2 (2d ed. 1984).

Petitioners also claim lack of national treatment (Pet. 26) because they were not able, in the Section 337 proceeding before the ITC, to make a counterclaim against Du Pont based on their own U.S. patent, whereas such a counterclaim could be made in a purely domestic patent case. Petitioners, however, did not receive treatment "less favorable" than that accorded U.S. firms and products. To the extent that petitioners' allegations below were considered as a defense to patent infringement, the ITC's treatment of the issue did not differ from that ordinarily ac-

corded in federal court.²⁵ The issue is in any event moot, since petitioners' U.S. patent has been adjudged by the Federal Circuit to be invalid and not infringed (*N.V. Akzo v. E.I. Dupont de Nemours, supra*).

Respondents in a Section 337 proceeding receive the *benefit* of many features of Section 337 that have no parallels in federal court patent proceedings. In addition to patent infringement, a Section 337 complainant must prove that the challenged imports will tend to destroy or substantially injure a domestic industry, efficiently and economically operated. Even if it does so, the Section 337 complainant cannot obtain a judgment for the substantial money damages that would be available in a domestic action for patent infringement. In sum, the claim that imported products are less favorably treated in a Section 337 case than products that are the subject of a patent infringement case is not well founded.

Finally, the GATT contracting parties have found that Section 337 is necessary for the enforcement of U.S. patent laws and that U.S. application of Section 337 therefore does not violate GATT obligations. *United States—Imports of Certain Automotive Spring Assemblies*, GATT Basic Instruments and Selected Docs., 30th Supp. at 107 (May 26, 1983); Conciliation Report, L/5333, of the Panel (adopted May 26, 1983). In that decision, concerning the ITC

²⁵ Petitioners were unable to raise their own U.S. patent as the equivalent of a counterclaim in district court because Section 337 can only be invoked on behalf of an industry in the United States against allegedly unfairly traded *imported* goods, but petitioners were as free as any domestic litigant to file a complaint in district court based on their U.S. patent. In fact, they did so. See *N.V. Akzo v. E.I. Dupont de Nemours*, 810 F.2d 1148 (Fed. Cir. 1987), *aff'g* 635 F. Supp. 1336 (E.D. Va. 1986).

exclusion order issued in *Certain Spring Assemblies & Components Thereof*, *supra*, a GATT dispute settlement panel determined that Section 337 was "necessary" within the terms of GATT Article XX(d). Article XX(d) provides a general exemption from other GATT obligations, including the "national treatment" requirements of GATT Article III.²⁶ The dispute settlement panel did not address the issue of national treatment under Article III of the GATT because of this exemption. Although the contracting parties to the GATT indicated that they could reexamine the "necessity" of Section 337 in different factual circumstances, there is no legitimate basis for distinguishing the present case from the *Certain Spring Assemblies* decision.²⁷

²⁶ Article XX of the GATT provides:

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

* * * *

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to * * * the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

²⁷ We note that on April 23, 1987, the European Economic Community requested consultations and establishment of a dispute settlement panel under Article XXIII of the GATT regarding Section 337. The United States intends to defend Section 337 as consistent with its obligations under the GATT.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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